BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in 132 F. (2d) 688, and is set out on pages 123 to 142 of the record filed herein.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, affirming the judgment of the District Court for the Eastern District of Missouri, was rendered on January 14, 1943 (R. 143), and petition for a rehearing was denied on March 4, 1943 (R. p. 179). Thirty days' stay of mandate was granted on March 16, 1943 (R. p. 179).

The following cases are believed to sustain the jurisdiction of this Court:

Erie Railroad Company v. Tompkins, 304 U. S. 64;
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389;
New York Life Ins. Co. v. Head, 234 U. S. 149;
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143.

III.

STATEMENT OF CASE.

In the petition for the writ is a statement of the case so far as it is material to a consideration of the questions presented, and in the interest of brevity a statement of the case is not repeated here.

IV.

SPECIFICATION OF ERRORS.

Petitioner assigns the following errors for a reversal of the judgment of the Court of Appeals:

1. The Court of Appeals erred in holding that the policy sought to be canceled by petitioner was an Illinois, and not a New York, contract because:

Under the terms of the application of February 17, 1940, the policy therein applied for was not to become effective until the first premium thereon was paid. The applicant did not pay the first annual premium on the policy which was issued on that application and his failure so to do and his request that the premiums on that policy should be payable monthly, instead of annually, was a rejection of that policy, and a counterproposal by the applicant, that the policy so applied for on February 17, 1940, should be issued on a monthly, instead of on an annual, premium basis, with the result that there was never any contract or policy of insurance until March 20, 1940, when petitioner complied with the applicant's request that the policy should be issued on a monthly, instead of on an annual, premium basis. Under the terms of the application of February 17, 1940, if the first premium on the policy therein applied for was paid at the time of the application, the policy was to become effective upon the Company's approval of that application (R. p. 66). Since the first monthly premium on the policy issued by petitioner on March 20, 1940, was paid on March 17, 1940, the insurance under that policy became effective on March 20, 1940, when petitioner at its home office in New York City accepted the applicant's request that the policy of March 4, 1940, should be changed or reissued on a monthly, instead of on an annual, premium basis. Consequently, the policy was a New York, and not an Illinois, contract, and the Court of Appeals should

have applied the law of New York, instead of the law of Illinois, in the determination of the question whether petitioner was entitled to a cancellation of that policy.

Griffen v. McCooch, 313 U. S. 498, 85 L. Ed. 1481;
Yeats v. Dodson, 345 Mo. 196, 127 S. W. (2d) 652;
Kellogg v. National Protective Life Ins. Co. (Mo. Ap.), 155 S. W. (2d) 512.

2. The Court of Appeals erred in holding that under the Illinois law the soliciting agent of a life insurance company is authorized to change or modify a contract of insurance on the company's behalf by providing that the premiums on the policy should be payable monthly instead of annually and that the policy should become effective on a date subsequent to that stated in the policy, notwithstanding the agreement of the insured in his application for the policy that only certain designated executive officers of the company were authorized or empowered to make or modify contracts on the company's behalf. This holding is not sustained by, but is contrary to, the law as announced by the Illinois courts.

Sommario v. Prudential Ins. Co., 289 Ill. Ap. 520, 7 N. E. (2d) 631;
Rozgis v. Missouri State Life Ins. Co., 271 Ill. Ap. 155;
Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516;
Covenant Mutual Life Ins. Co. v. Conway, 10 Ill. Ap. 348;
Pralle v. Metropolitan Life Ins. Co., 346 Ill. 58, 178 N. E. 371, affirming 252 Ill. Ap. 460;
Rummler v. Metropolitan Life Ins. Co., 316 Ill. Ap. 362, 45 N. E. (2d) 86;
Rocca v. Metropolitan Life Ins. Co., 300 Ill. Ap. 592, 21 N. E. (2d) 849;
Phoenix Ins. Co. v. Maxson, 42 Ill. Ap. 164;
Slocum v. New York Life Ins. Co., 228 U. S. 364.

3. The application by the Court of Appeals of the law of Illinois, instead of the law of New York, in determining the right of petitioner to a cancellation of the policy, deprived petitioner of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, because the law of Illinois cannot constitutionally be applied in determining the rights and obligations of the parties under a New York contract.

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389;
New York Life Ins. Co. v. Head, 254 U. S. 149;
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143.

4. The Court of Appeals erred in holding that even if petitioner's soliciting agent had no authority to change the premiums payable under the policy of March 4, 1940, from an annual to a monthly basis, nevertheless petitioner ratified the soliciting agent's unauthorized change or modification of that policy in this respect by its acceptance of the first and subsequent monthly premiums on the policy of March 20, 1940, because there is no evidence that petitioner, when it accepted the first or subsequent monthly premiums on the policy, knew that its soliciting agent had undertaken on its behalf to change or modify the policy of March 4, 1940, by providing that the premiums thereunder should be payable monthly instead of annually. This holding of the Court of Appeals is contrary to the holding of the courts of Illinois, as well as to the holding generally, that a principal will not be held to have ratified the unauthorized acts of an agent in the absence of any evidence that the principal knew of the unauthorized act of the agent at the time of his alleged ratification thereof.

Morse v. Illinois Power & Light Co., 294 Ill. Ap. 498, 14 N. E. (2d) 259;
Erie Ry. Co. v. Johnson (C. C. A. 6), 106 F. (2d) 550.

ARGUMENT.

I.

The policy was a New York, and not an Illinois, contract.

Since this suit was instituted in the District Court in Missouri, the Missouri conflict-of-laws rule was controlling (Griffen v. McCooch, 313 U. S. 498, 85 L. Ed. 1481).

In Missouri the law of the state where the policy became effective determines petitioner's right to a cancellation of the policy. In Yeats v. Dodson, 345 Mo. 196, 206, 127 S. W. (2d) 652, 656, the Missouri Supreme Court said:

> "The policy became finally effective at Kansas City, Missouri, because the last act necessary to a completed contract was to be performed by the attorneys in fact, acting on behalf of the Ice Company and the other subscribers, to determine for them the kind of contract to be made and to make it for them (Daggett v. Kansas City Structural Steel Co., 334 Mo. 207, 65 S. W. [2d] 1036; Illinois Fuel Co. v. Mobile & Ohio Railroad Co., 319 Mo. 899, 8 S. W. [2d] 834, certiorari denied 278 U. S. 640; Pickett v. Equitable Life Assurance Society [Mo. Ap.], 27 S. W. [2d] 452; Fields v. Equitable Life Assurance Society [Mo. Ap.], 118 S. W. [2d] 521; 11 Am. Jur. 391-393, Sec. 107)."

In Kellogg v. National Protective Ins. Co. (Mo. Ap.), 155 S. W. (2d) 512, 514, the Court said:

> "It would appear to follow that the last act done to make a binding contract was done in Missouri and therefore the contract must be construed and governed by the laws of Missouri."

In his written application on February 17, 1940, Chapman requested that the premiums on the policy therein applied for should be payable annually and that the policy should

be dated on the date that it was written (R. p. 65). It was also provided in that application:

> "That the insurance hereby applied for shall not go into force unless and until the policy is delivered to and received by the applicant and the first premium paid thereon during his lifetime, and then only if the applicant has not consulted or been treated by any physician or practitioner since his medical examination, and thereupon the policy shall be deemed to have taken effect as of the date specified under 3 above (the date that the policy was written); provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full amount of the first premium for the insurance hereby applied for, and so declares in this application and receives from the soliciting agent a receipt therefor on the form attached as a coupon to this application and corresponding in date and number herewith, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable * * * then said insurance shall take effect and be in force * * * from and after the time this application is made, whether the policy be delivered to and received by the applicant or not" (R. p. 66).

As Chapman did not pay the first premium at the time of that application, the policy, under the foregoing provision of the application, was not to become effective until it was delivered and the first premium thereon was paid.

That application was accepted by petitioner on March 4, 1940, on which date it issued the policy therein applied for and mailed the same to its St. Louis, Missouri, office. That policy, as Chapman had requested in his application, provided that it was issued in consideration of the payment in advance of an annual premium of $389.50 and that its effective date was March 4, 1940 (R. pp. 72-73). On March 17, 1940, Mr. Cusick, the soliciting agent, called on Chap-

man at his home in Belleville, Illinois, to deliver the policy and to collect the first premium. Chapman, however, told him that he could not pay the first premium and that he wanted the premiums on the policy to be payable monthly instead of annually. Mr. Cusick informed Chapman that this could be arranged, although it would cost Chapman more money. Chapman stated, however, that this was the only way he could handle the matter, and, upon being advised by Mr. Cusick that the monthly premium would be $34.70, Chapman gave Cusick a check for that amount (R. pp. 106-107) and Mr. Cusick gave Chapman the following receipt (R. p. 111):

"March 17, 1940

Received of A. W. Chapman policy #17558729 in order to change to monthly rate basis and redate policy as of to-day.

Wm. J. Cusick, Agent
New York Life Ins. Co."

Cusick thereupon returned the policy to the petitioner's home office in New York City, and, upon its receipt there on March 20, 1940 (R. p. 71), petitioner inserted in the original application, under the heading of "Additions or Amendments (for home office use only)," a statement that the premiums were to be payable monthly and that insurance was to take effect as of March 17, 1940 (R. p. 73), instead of March 4, 1940, destroyed the policy of March 4, 1940 (R. p. 71), and issued another policy dated March 20, 1940, which provided that it was issued in consideration of the payment of a monthly premium of $34.70, instead of an annual premium of $389.50, and that its effective date was March 17, 1940, instead of on March 4, 1940 (R. p. 48). That policy was then mailed to the company's St. Louis office (R. p. 74), and upon its receipt at that office it was mailed to the insured at Belleville, Illinois (R. p. 108).

On these facts the Court of Appeals held that the policy was an Illinois, and not a New York, contract (R. p. 140). In arriving at that conclusion the Court of Appeals held that when Cusick, on March 17, 1940, at Belleville, Illinois, undertook to deliver the policy of March 4, 1940, to Chapman, and when he was advised by Chapman that he could not pay the first premium thereon, Cusick thereupon changed or modified that policy by providing for the payment of a monthly premium of $34.70 instead of an annual premium of $389.50, and that the effective date of the policy should be March 17, 1940, instead of March 4, 1940 (R. pp. 134, 140), and that his modification of the policy in these respects was binding on petitioner under the Illinois law despite Chapman's agreement in the application for that policy that "only the President, a Vice President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements" (R. p. 66).

The Court of Appeals held that under the law of Illinois the soliciting agent of a life insurance company, even though the applicant for the policy had agreed in his application that the soliciting agent had no authority to make or modify a policy on the company's behalf, may nevertheless bind the company by policy changes which are "not material" (R. p. 140), and that Cusick's agreement that the premium on this policy should be a monthly premium of $34.70 instead of an annual premium of $389.50, and that the effective, and anniversary, date of the policy should be March 17, 1940, instead of March 4, 1940, were immaterial changes which were binding upon the company.

The Court of Appeals cites John Hancock Mutual Life Ins. Co. v. Schlenk, 175 Ill. 224, 51 N. E. 795; Guter v. Security Benefit Life Ins. Co., 335 Ill. 174, 166 N. E. 521; Bennati v. John Hancock Mutual Life Ins. Co., 201 Ill. Ap. 438, 8 N. E. (2d) 551, and Mulligan v. Metropolitan Life Ins. Co., 149 Ill. Ap. 516, in support of its holding

that under the Illinois law the soliciting agent of a life insurance company can bind the company by changes in the policy which are not "material or prejudicial" to the company, even though the applicant has agreed in his application for the policy that a soliciting agent has no power or authority to make **any** change or modification of the policy on the company's behalf. None of those cases supports that holding.

In the **Schlenk** case the policy was applied for on August 7, 1895, and the applicant died on August 12, 1895. At the time of the application it was agreed between the agent, who was a **general**, and not a soliciting, agent, as was Cusick, and the applicant that for the first premium on the policy the agent would accept a sewing machine from the applicant and would also assume, and cancel, an indebtedness of $18 owing by a third person to the applicant, and that the difference between the amount of the premium and the value of the sewing machine and the indebtedness to be assumed by the agent would be paid by the applicant in cash.

When the agent received the policy he took it to the applicant's place of business, but, finding that the latter was ill, called on the applicant's brother and told him about his previous understanding with the applicant and that he would deliver the policy upon the payment of $25, which was the amount of the first premium that the agent was required to pay the company after the deduction of his commission. The applicant's brother thereupon paid the agent the sum of $25 and the agent delivered the policy to him.

The policy contained a clause that it was not to become effective unless it was delivered to the applicant during his lifetime and good health, and one of the issues in the Schlenk case was whether the policy took effect upon its delivery to the applicant's brother, when the agent knew that the applicant was ill. The other question at issue in

that case was whether agent was authorized to accept payment of the first premium partly in cash and partly in merchandise.

On the first issue the Court held that as the agent was the company's agent for the delivery of the policy, and as he had delivered the policy with knowledge that the insured was ill, the company had thereby waived the requirement of the policy that it was not to become effective unless the applicant was in good health at the time of its delivery. That holding, however, has no application here for several reasons. In the first place, the agent in the Schlenk case was, and advertised himself as, a "general agent" and the applicant had no knowledge that he was other than a general agent. In the case at bar, on the other hand, Mr. Cusick had never held himself out, or advertised himself, as being a general agent of petitioner. In the second place, while the **policy** in the Schlenk case limited and restricted the authority of agents, it does not appear that the **application** for that policy contained any such restriction. Consequently, the applicant in the Schlenk case could not have known of any restriction on the power or authority of the agent in that case until he received the policy and the acts of the agent on which a waiver was predicated all occurred **before** the **policy** was **delivered** the applicant. In the case at bar, on the other hand, Chapman was informed in his application for the policy that Cusick had no power or authority to make or modify any contract on the company's behalf, so that Chapman knew when Cusick called to deliver the policy to him on March 17, 1940, that Cusick had no power or authority to change or modify that policy. In the third place there is a fundamental distinction between the power of an agent **to change or modify a contract of insurance on the company's behalf** and his power to **waive** a **condition** of the policy concerning which the agent is empowered to

act on the company's behalf. Consequently the holding in the Schlenk case that the delivery of the policy by the agent with knowledge that the applicant was ill was a waiver of the condition of the policy that it was not to take effect unless the applicant was in good health at the time of the delivery, is no authority for the holding in the case at bar that Cusick, despite the restriction on his authority in the application, could nevertheless bind the company by the changes which he is alleged to have made in this policy.

On the second issue in the Schlenk case the Court held that since the agent had received in cash that portion or part of the first premium which was payable to the company, the latter could not complain, and was in no way prejudiced, because the agent had agreed to accept merchandise instead of cash for his portion of that premium.

Clearly, therefore, the Schlenk case does not support or justify the holding of the Court of Appeals in the case at bar that Cusick was authorized to change or modify the policy of March 4, 1940, by providing that the premiums under that policy should be payable monthly instead of annually and that that policy should become effective on March 17, 1940, instead of on March 4, 1940.

Guter v. Security Benefit Life Ins. Co. (335 Ill. 174, 166 N. E. 521) is likewise without application here. That case was an action on a policy issued by a fraternal society which claimed that the policy had been procured through false and fraudulent representations on the part of the insured in his application that neither of his parents had died from tuberculosis. There was evidence in that case that the medical examiner of the society was informed when he examined the insured for the policy that both of insured's parents had died of tuberculosis, notwithstanding which the medical examiner stated in the application that both of insured's parents had died from some other ail-

ment. The Illinois court held under these circumstances that the knowledge of the society's medical examiner was the knowledge of the society, that the insured's parents had died from tuberculosis, and that the society in issuing the policy with that knowledge had waived the right to assert the falsity of this representation in avoidance of the policy.

Manifestly, the holding in the Guter case does not support or sustain the holding of the Court of Appeals in the case at bar that Cusick was authorized to change or modify the policy of March 4, 1940, by providing for the payment of premiums monthly instead of annually or that the policy should become effective from March 20, 1940, instead of from March 4, 1940.

The Benatti case (201 Ill. App. 438, 8 N E. [2d] 551) likewise does not support the holding of the Court of Appeals that the soliciting agent of a life insurance company, under the Illinois law, can bind the company by "immaterial" changes in the policy of insurance despite the restriction in the application on the authority of the agent to make or modify contracts on the company's behalf. On the contrary, the Benatti case repudiates that holding.

The Benatti case was an action on an industrial policy under which the premiums were payable weekly. In an action on the policy after insured's death the company defended on the ground that the policy had lapsed prior to insured's death for the nonpayment of a weekly premium which became due on February 20, 1935. An Illinois statute provided that the insured should be entitled to a grace period of one month for the payment of premiums. On March 22, 1935, the beneficiary mailed a check to defendant's district office for the premium due February 20, 1935, which was received at that office on March 23, 1935. The insured died on March 24, 1935, and the Court held that, as the premium due February 20, 1935, had been paid

within the statutory grace period, the policy was in force at the time of insured's death.

One of the contentions of the beneficiary in the Benatti case was that the company had waived the prompt payment of the premium due February 20, 1935, because its agent, with authority to collect and receive premiums, had collected and accepted prior premiums after their due date, and also because this agent had informed and advised the insured that the policy would not lapse if the premium was paid within a day or two after the expiration of the grace period. With respect to that contention the Court said (8 N. E. [2d], l. c. 554):

> "**Of course**, the **rule is** that an agent of an insurance company is **not empowered** to **change** the **provisions** of the contract. **This must be conceded,** but a company operating through its agents can be bound by the acts of its agents in waiving provisions providing payment of premiums. In support of this rule no citation of authority of courts of last resort are necessary."

It is one thing to hold, as was held in the Benatti case, that the soliciting agent of a life insurance company may waive, on the company's behalf, a condition of a policy concerning which he is authorized to act for and on the company's behalf. It is quite another thing, however, to hold that such an agent may bind the company by a change or modification of the policy, especially when, as here, the applicant was informed and notified in the application that such agents have no power or authority to make or modify contracts on the company's behalf. Clearly, therefore, the holding in the Benatti case that an agent with authority to collect and accept premiums on the company's behalf may waive the prompt payment of premiums due under the policy is no authority for the holding of the Court of Appeals in the case at bar that Cusick was authorized and empowered to change the premiums on this policy from

an annual to a monthly basis and to change the effective date of the policy from March 4, 1940, to March 20, 1940, and this despite the provision in the application that such agents were not authorized or empowered to make any changes or modification of policies on the company's behalf.

Mulligan v. Metropolitan Life Ins. Co., 149 Ill. App. 516, likewise does not support the holding of the Court of Appeals in the case at bar that Cusick was authorized to make these changes in the policy of March 4, 1940, despite the restriction on his authority in the application.

In the Mulligan case the Illinois court upheld an agreement by the soliciting agent to accept payment of the first premium in weekly installments instead of in one sum, but there was no agreement by the agent in that case that the premiums on the policy should be payable weekly instead of semiannually, as provided in the Mulligan policy. In other words, there was no attempt on the part of the soliciting agent in the Mulligan case to change or modify the policy. Furthermore, there **was no** provision in **either the** Mulligan **policy** or in the **application for that policy that soliciting agents had no power or authority to make or modify contracts on the company's behalf.**

Clearly, therefore, these cases do not sustain or support the holding of the Court of Appeals that Cusick, petitioner's soliciting agent, was authorized and empowered under the Illinois law to change the policy of March 4, 1940, in these particulars.

II.

Under the law of Illinois the soliciting agent of a life insurance company is not authorized or empowered to change or modify a policy on the company's behalf when the application for the policy expressly provides that the soliciting agent shall have no such authority.

The following cases in Illinois are contrary to the holding of the Court of Appeals in the case at bar that the soliciting agent of a life insurance company may change or modify contracts on the insurer's behalf despite a provision in the application for a policy that he shall have no such authority.

Sommario v. Prudential Ins. Co., 289 Ill. App. 520, 7 N. E. (2d) 631;
Rozgis v. Missouri State Life Ins. Co., 271 Ill. App. 155, 157;
Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 524;
Covenant Mutual Life Ins. Co. v. Conway, 10 Ill. App. 348, 353;
Pralle v. Metropolitan Life Ins. Co., 346 Ill. 58, 178 N. E. 371, affirming 252 Ill. App. 460, 466;
Rummler v. Metropolitan Life Ins. Co., 316 Ill. App. 362, 45 N. E. (2d) 86;
Rocca v. Metropolitan Life Ins. Co., 300 Ill. App. 592, 21 N. E. (2d) 849;
Phoenix Ins. Co. v. Maxson, 42 Ill. App. 164.

In the Sommario case, supra, the Illinois Court said (7 N. E. [2d], l. c. 633):

> "It is known from common experience that all solicitors of insurance, no matter how limited their authority may be, are authorized to accept an application and the payment of the initial premium, and to forward same to the proper office, and, when the policy is issued, to deliver it to insured, but this does **not** con-

stitute them **general agents if their authority is in fact otherwise limited**, and in order to show that a solicitor has broader powers, or the powers of a general agent, it is incumbent upon the party so contending to show, by competent evidence other than the testimony of the agent himself, the specific authority claimed."

In Winnesheik Ins. Co. case, supra, the Illinois Supreme Court said (53 Ill., l. c. 524):

"The question then arises as to the power of these agents to make such a contract. The warrant of their authority is in the record. By that they were only authorized to receive applications for insurance in accordance with the instructions to agents, and to collect and transmit the premiums therefor. This was the extent of their authority, and no instructions have been shown from their principals authorizing them to go one step beyond this, nor is there any proof they ever did, or ever designed to go a step beyond * * *. We decide * * * **that any contract of insurance effected by the agents of appellants was not binding upon appellants, such contract not being within the scope of the authority with which they were vested by the company** * * *."

In the Pralle case, supra, the Illinois Supreme Court said (178 N. E., l. c. 374):

"While the authority of an agent to make oral contracts for fire insurance has been frequently upheld in this state (cases), there is no holding in this state that such authority exists on agents selling **health** and **accident** insurance."

In Rozgis, supra, the Court said (271 Ill. Ap. 155, 157):

"An agent having authority only to solicit applications and forward to home office, is a soliciting agent and **has no power to waive** the **provisions of a policy**

(Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516; Parden v. Wasavary, 249 Ill. Ap. 327; Niedringhaus v. Aetna Life Ins. Co., 235 Ill. Ap. 254)."

In Covenant Mutual Benefit Assn. case, supra, the Court said (10 Ill. Ap., l. c. 353):

> "It is insisted here that there was a valid contract with the agent, and it is important to inquire whether the agent had power to make such a contract. **Life insurance agents are ordinarily only authorized to receive and forward applications for the approval of the company** * * *.
>
> "It is apparent in this case that the **agent had no such power**, and **even if he assumed it, the defendant would not be liable unless he had been held out as a general agent** and the circumstances were such as to warrant the deceased in supposing he possessed the power so assumed. But we think the deceased **had no such** warrant. The **usual course of business in life insurance and the powers ordinarily given to such agents, he is presumed to have known.**"

In the Rummler case, supra, the Appellate Court of Illinois held that an insurer was not bound by the agreement of its soliciting agent to reinstate a policy of insurance following its lapse when the policy provided, as did the application for the policy in the case at bar, that only certain designated officers of the company were authorized to make or modify contracts on the company's behalf. The Court said (45 N. E. [2d], l. c. 88):

> "The master who heard the evidence makes no factual finding as to the conversation between the plaintiff and Kritikson, but **he concluded that defendant was not bound by any statements made by its agents in connection with the** application **for reinstatement**, and **his conclusion** is **fortified** by a provision of the policy which could not have escaped plaintiff's attention if he read it, as he said he did, that **'no agent** is

authorized to waive forfeitures, **to alter or amend this policy,** to accept premiums in arrears or to extend the due date of any premium.' "

In the Rocca case, supra, the policy provided that "no agent is authorized to waive forfeitures or to make, modify or discharge contracts," and the Illinois Appellate Court, in holding that the company's agent had no power to change the terms of a policy issued by the company, said (21 N. E. [2d], l. c. 852):

> "So, in the instant case, the policy of insurance offered by plaintiff expressly shows that the agent had no power to change the terms of the policy, so far as payment and reinstatement was concerned, nor have we been able to find any testimony tending to prove that the agent had any power, excepting that which plaintiff said Seaman told her when he talked with her about the extension of her husband's policy. We are mindful of the rule, and if there were any evidence or any testimony from which any legal inference might be drawn, showing the agent had any authority to bind his principal, we would promptly reverse the trial court in its decision and direct that the case be heard before a jury, but we have been unable, after a most diligent search, to find any evidence which would justify our doing this. **The claimed conversation between Seaman, the agent,** and the **beneficiary could not be considered as evidence affecting the contract between the insured and the defendant company.**"

In the Phoenix Ins. Co. case, supra, a fire insurance policy contained a clause avoiding it if the insured premises became vacant and further provided that the only person authorized to waive the vacancy clause of the policy was the company's agent in Chicago. The Illinois Appellate Court held that a district agent of the company was not authorized to waive that clause of the policy and said (42 Ill. Ap., l. c. 170):

"Miller had no authority to waive the condition. An **authority could not be presumed** because appellee had been **advised** by the **terms** of the **policy** of the **only person** authorized to **waive it** and the manner of waiving it. * * *

"Where a **policy** already issued and delivered, which, **by the terms of the instrument, can** be waived only in writing and **by a certain officer** named, an **attempted** parol **waiver by another does not bind the insurance company. Nor** is it **competent** to show by a contemporaneous verbal **arrangement made by a special agent of the company, another different and contradictory agreement was made which modified or altered** the **condition contained** in the **policy** * * *.

"**Before** the making of the alleged statement by Miller, **she had knowledge of the contents of the policy and the limitation of authority to waive the vacancy condition, or at least ample opportunity to possess herself of such knowledge.** * * *

"In this case not only was the **modification** contended for with reference to the future conduct of the assured, **other and different** from the then **existing state of affairs, but** was made **by an agent whom the assured had been notified had no authority to make such modification.** Where the **assured** is **notified of the limitation of the authority of the agent,** the **former cannot rely upon the statement of the latter in excess of his authority.**"

There is no evidence and no claim in the case at bar that Cusick had ever been held out as being a "**general** agent" of petitioner or that he had ever previously undertaken to make, change or modify policies or contracts of insurance on petitioner's behalf.

No Illinois authority is cited by the Court of Appeals in support of its holding that under the law of Illinois the change of the premiums on the policy from an annual to a monthly basis and the change in the effective date of the policy from March 4, 1940, to March 20, 1940, were "immaterial" changes in that contract.

Clearly the amount of the premium and its mode of payment is an essential and material term of a contract of insurance and, even if it was the law of Illinois, which it is not, that a soliciting agent may bind the company by immaterial changes in the policy despite a provision of the application that he shall have no authority to make any change or modification of the policy, that rule of law would not apply to the changes in the policy of March 4, 1940, which are claimed to have been made by Cusick on petitioner's behalf.

In Slocum v. New York Life, 228 U. S. 364, the policy provided for the payment of an annual premium of $579.60. For the premium due on November 27, 1907, the insured paid the company's agent the sum of $264.20 in cash and agreed to execute a premium or "blue" note for the balance of that premium. The insured, however, died before that note could be executed. The Court held that the agent's acceptance of the sum of $264.20 did not constitute a partial payment of that premium and said (l. c. 374):

> "The policy plainly provided for the payment of the stipulated premium annually within the month of grace following the due day, **and as plainly excluded any idea that payment could be made in installments distributed through the year.** Concededly, there was no payment of the whole of the premium in question, and as a partial payment was not within the contemplation of the policy, nothing was gained by handing to the agent the check for $264.20, unless what he did in that connection operated as a waiver of full and timely payment."

The policy in the Slocum case provided, as here, that the agent should have no power or authority to make or modify contracts in the company's behalf and the Court in holding that the agent had no authority, in view of this restriction in the policy, to waive the payment in full of that premium, said (l. c. 374):

"One who deals with an agent knowing that he is clothed with a circumscribed authority and that his act transcends his powers, cannot hold his principal; and this is true whether the agent is a general or a special one, for a principal may limit the authority of one as well as of the other.

"Under the terms of the policy, as qualified by the practice of the company, the agent was without authority to waive full and timely payment of the premium, save as he could adjust the payment conformably to the blue note plan. His authority turned upon the giving of the note, which was a matter of real substance, and not of mere form, as is shown by the terms of the note, before quoted. See White v. New York Life Ins. Co., 200 Mass. 510. Without it he could neither accept a partial payment nor extend the time of paying the balance. No note was given and so no waiver resulted from his acts. The insured and his wife could not reasonably have understood it otherwise, for they knew the terms of the policy and were familiar with the qualifying practice."

And in further holding that the Slocum case could not be submitted to the jury on the theory of a ratification by the company of an acceptance by its agent of the sum of $264.20 as a partial payment of this premium the Court said:

"There was no evidence that the company itself treated the check as a partial payment or otherwise ratified the agent's acts. Indeed, the only permissible inference from the evidence was to the contrary."

The Court of Appeals in support of its holding that the agreement of Cusick that the premiums on the policy should be $34.70 monthly instead of $389.50 annually was an immaterial change, states that under the policy the insured had the option of changing the mode of premium payment from an annual to a monthly basis (R. 140). Even

if the policy had given the insured any such option, nevertheless that policy would have had to become effective before the insured could have claimed the benefit of that option and it is petitioner's insistence that the policy did not become effective until March 20, 1940, when the company itself, at Cusick's request, changed the mode of premium payment from an annual to a monthly basis. Furthermore, neither of the policies which were issued on Chapman's application of February 17, 1940, gave the insured the option or privilege of paying his premiums monthly. In its printed record in the Court of Appeals petitioner did not incorporate therein the clause of the policy which gave the insured the option or privilege of changing the mode of premium payment because it did not consider that that clause of the policy was material to the issues on that appeal and under Rule 10 (a) of the Court of Appeals for the Eighth Circuit only such part of the entire record on appeal shall be printed which is deemed essential to a determination of the issues involved. When, however, the Court of Appeals handed down its opinion, in which it stated that the policy gave the insured the option or privilege of paying the premiums on the policy monthly, petitioner filed a motion (R. 143) in the Court of Appeals to correct the printed record by including therein the clause of the policy giving the insured the option or privilege of changing the mode of premium payment. That motion was denied by the Court of Appeals (R. 144). There has been transmitted by the Clerk of the Court of Appeals to the Clerk of this Court with the record in this cause the original policy of March 17, 1940, marked "Defendant's Exhibit A" in the District Court, which policy was, as is shown by the certificate of the Clerk of the Court of Appeals thereto, lodged by respondent with the Court of Appeals at the oral argument for the use of the Court in the determination of the cause. Under these circumstances we submit that that policy is properly before this Court for

consideration. As shown by the printed record (page 72), the policy of March 17, 1940 (R. p. 48), is the same as the policy of March 4, 1940 (R. p. 72), with the exception of the amount and due date of the premiums and the effective date of the policy. The provision of the policy for a change in the mode of premium payment is as follows (page 6, Par. 5 of Policy):

> "The premium may be made payable annually, semiannually, or quarterly in advance at the company's respective rates for such modes of payment, and, except as may be otherwise provided, the mode of payment may be changed by agreement in writing and not otherwise."

Manifestly, therefore, the statement of the Court of Appeals in its opinion that the policy of March 4, 1940, gave the insured the option of paying his premiums monthly is an erroneous statement.

Furthermore, the effective, and anniversary date of a policy is also a material term of the contract and the agreement of Cusick, even on the assumption that he made such an agreement, that the policy of March 4, 1940 should become effective on March 17, 1940, instead of March 4, 1940, and that March 17, 1940, instead of March 4, 1940, should be the anniversary date of that policy, were material, and not immaterial, changes.

If, therefore, Cusick had no authority under the Illinois law to change or modify the policy of March 4, 1940, so that the premiums thereunder should be payable monthly instead of annually, and that the effective date of that policy should be March 17, 1940, instead of March 4, 1940, then unquestionably there never was any contract of insurance until the petitioner at its home office in New York City on March 20, 1940, rewrote that policy by providing for the payment of premiums thereon monthly instead of annually, and that the effective date of the policy should be March 17, 1940, instead of March 4, 1940. As the first

monthly premium on that policy was paid on March 17, 1940, the policy, under the provisions of the application of February 17, 1940, became effective upon the company's acceptance of the counter proposal or offer of the applicant that the premiums on the policy should be payable monthly instead of annually. Unquestionably, therefore, the policy of March 4, 1940 never became effective and as the policy of March 20, 1940 became effective in New York, that policy was a New York, and not an Illinois contract, as held by the Court of Appeals.

III.

Under the law of Illinois petitioner could not be held to have ratified the unauthorized agreement of its soliciting agent that the premiums on the policy of March 4, 1940 should be payable monthly instead of annually by petitioner's acceptance of the first monthly premium on the policy of March 20, 1940 in the absence of any evidence that petitioner knew of the unauthorized agreement on the part of its agent when it accepted that premium.

There is no evidence whatever that petitioner knew, when it accepted the monthly premium of $34.70 which had been paid to petitioner's soliciting agent Cusick on March 17, 1940 that Cusick had undertaken on its behalf to change the premiums payable under the policy of March 4, 1940 from an annual to a monthly basis. On the contrary, the evidence clearly establishes that that premium was accepted by petitioner in connection with Cusick's request that the policy of March 4, 1940 should be issued on a monthly, instead of on an annual, premium basis. In other words, that premium was tendered to petitioner in connection with a request that petitioner should change the policy of March 4, 1940 from an annual, to a monthly, pre-

mium basis, and not as a payment of the first premium on a policy which had already been changed by petitioner's soliciting agent from an annual, to a monthly, premium basis.

That a principal will not be deemed to have ratified the unauthorized act or agreement of his agent unless he knew of the agent's unauthorized act or agreement at the time of his alleged ratification thereof is not only the law of Illinois, but it is the law generally.

In Morse v. Illinois Power & Light Co., 294 Ill. App. 498, 14 N. E. (2d) 259, 262, the Court held that a principal could not be held to have ratified an unauthorized agreement of his agent to repurchase stock sold on his principal's behalf unless the principal knew of the unauthorized repurchase agreement at the time of his alleged ratification thereof, and said:

> "The acceptance of the money, knowing that Burnett sold the stock, would constitute a ratification of his agency in the sale of the stock, but it would **not be** a **ratification** of the **repurchase** agreement **unless it was shown that it had full knowledge of it.**"

In Erie Ry. Co. v. Johnson (C. C. A. 6), 106 F. (2d) 550, 552, the Court said:

> "There being no evidence whatever that appellant had authorized or ratified the acts of the officers, it was error to submit the case to the jury."

IV.

The law of Illinois cannot be constitutionally applied in the determination of the rights and obligations of the parties under a New York contract.

It has been repeatedly held by this Court that a contract made in State A cannot be constitutionally controlled by the laws of State B.

In Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, a seven-year term policy was applied for and delivered to the insured in Tennessee. That policy gave the insured the option or privilege of converting it during the seven-year period to any other form of policy issued by the company. After the insured had moved to Texas, he elected in that state to convert the policy to another form of policy and the question at issue was whether the converted policy was a Tennessee or a Texas contract. The Texas Supreme Court held that it was a Texas contract and was therefore controlled by the laws of that state. On a writ of error to this Court on the ground that the application of the Texas statutes to what the company claimed was either a Tennessee or a Connecticut contract, deprived it of its property without due process of law in contravention of the Fourteenth Amendment, it was held that the converted policy was a Tennessee and not a Texas contract and that, therefore, the Texas statute could not constitutionally apply to the action on the converted policy. In that connection the Court said (l. c. 393, 399):

> "Other matters aside, the contention that the contract is controlled by the law of Tennessee or Connecticut—in which event the Texas statute in respect of penalty and attorney's fee as construed and applied, is unconstitutional—clearly presents a substantial question under the full faith and credit clause of the Constitution. Royal Arcanum v. Green, 237 U. S. 531, 540, 541. See, also, New York Life Ins. Co. v. Head, 234 U. S. 149, 159-160.
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> "In the light of these decisions, then, we inquire whether the second policy issued to Dunken is to be controlled by Tennessee or Texas law. The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. **The Texas statute was incapable of being constitutionally applied to it** since the effect of

such application would be to regulate business outside of the State of Texas and control contracts made by citizens of other states in disregard of their laws under which penalties and attorney's fees are not recoverable. New York Life Ins. Co. v. Head, 234 U. S. 149; Overby v. Gordon, 177 U. S. 214, 222. The second policy here was issued in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the contract contained in the first one. By those provisions, upon the simple application of the insured, the new policy must issue. Nothing was left to future agreement. The terms of the new policy were fixed when the original policy was made. In effect, it is as though the first policy had provided that upon demand of the insured and payment of the stipulated increase in premiums that policy should, automatically, become a twenty-payment life commercial policy. It was issued, not as the result of any new negotiation or agreement, but in discharge of pre-existing obligations. It merely fulfilled promises then outstanding; and did not arise from new or additional promises. The result in legal contemplation was not a novation, but the consummation of an alternative specifically accorded by, and enforceable in virtue of, the original contract. If the insurance company had refused to issue the second policy upon demand, the insured could have compelled it by a suit in equity for specific performance.

"From these premises it necessarily results that the second policy follows the status of the first for which it was exchanged, and is **not subject** to the **Texas statute** relating to penalties and attorney's fees, but is controlled by **Tennessee law.** The judgment below, therefore, in so far as it **gives effect** to the **Texas statute by imposing** a penalty of twelve per cent and allowing attorney's fees, is erroneous in that the **Texas statute cannot constitutionally** be applied to a **Tennessee contract.**"

In New York Life Ins. Co. v. Head, 234 U. S. 149, the question at issue was whether a policy loan agreement was

a New York or a Missouri contract. The Missouri Supreme Court had held that it was a Missouri contract and was controlled by the Missouri statutes. On a writ of error this Court held that the loan agreement was a New York contract and that, consequently, the application of the Missouri statutes to a New York contract deprived the company of its property without due process of law in contravention of the Fourteenth Amendment.

In Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, it was held that the application by the Mississippi Supreme Court of a statute of Mississippi to what this Court held was a Tennessee contract deprived the defendant of its property without due process of law. The Court said (l. c. 149):

> "A state may limit or prohibit the making of certain contracts within its own territories (Hooper v. California, 155 U. S. 648; Orient Insurance Co. v. Daggs, 172 U. S. 557, 565-6; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 398-9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction and lawful where made. New York Life Insurance Co. v. Head, 234 U. S. 149; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Insurance Co. v. Deck, 281 U. S. 397, 407-8. * * *
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> "A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those of the place of the contract, conflicts with the guarantees of the Fourteenth Amendment."

While it is true that in the foregoing cases the Court was considering the right to apply the statutory law of State A to a contract made in State B, there can be no distinction between the statutory and the common law in this regard. In other words, if the respondent could not have recovered under the policy of March 17, 1940, if it was controlled by the New York law, and the Court of Appeals concedes that there could have been no recovery under the policy under the New York law, then the petitioner is just as much prejudiced by the application of the common law of Illinois, under which the Court of Appeals holds that respondent was entitled to recover on the policy, as it would have been by the application of the statutory law of Illinois.

There can likewise be no question, under the foregoing decisions, that where, as here, a petitioner claims that he has been deprived of his property without due process of law by the application of the laws of one state in the determination of his obligations under a contract which he asserts was made in another state, this Court must determine for itself where the contract was made in order for it to determine the applicatory law and whether petitioner has, as claimed, been deprived of his property in contravention of the Fourteenth Amendment by the application of the law of State A to a contract which is claimed to have been made in State B.

Respectfully submitted,

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